

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1316

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellant

v.

SAMUEL DONALD KNIGHT
a/k/a Michael Procak
a/k/a Donald C. Parker

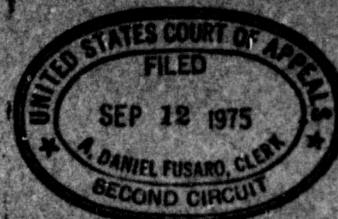
Appellee

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR SAMUEL DONALD KNIGHT

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TABLE OF CONTENTS

TABLE OF CASES.	ii
STATEMENT OF ISSUES	iii
STATEMENT OF FACTS.	1
ARGUMENT	6
POINT I	
THE GOVERNMENT HAS FAILED TO SHOW THAT MR. KNIGHT WAS ABSENT OR UNAVAILABLE BE- TWEEN MARCH 1, 1973, AND DECEMBER 7, 1974, THEREBY REQUIRING THAT THAT PERIOD BE COMPUTED UNDER RULE 4	8
POINT II	
THE GOVERNMENT HAS FAILED TO SHOW THAT MR. KNIGHT WAS COOPERATING WITH THE GOVERNMENT IN RETURN FOR REDUCTION OR DISMISSAL OF CHARGES, THEREBY PRECLUDING THE APPLICABILITY OF RULE 5(h) AND <u>U. S. v.</u> <u>VALOT</u> , SUPRA.	11
CONCLUSION.	13

TABLE OF CASES

Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973).

United States v. Flores, 501 F.2d 1356 (2nd Cir. 1974)
(per curiam).

United States v. MacDonough, 504 F.2d 67 (2d Cir. 1974).

United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972).

United States v. Valot, 481 F.2d 22 (2d Cir. 1973).

STATEMENT OF ISSUES

I. WHETHER THE DISTRICT COURT CORRECTLY DENIED THE GOVERNMENT'S REQUEST TO EXCLUDE THE PERIOD MARCH 1, 1973, THROUGH DECEMBER 7, 1974, UNDER RULE 5(d) OF THE SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES AND THE DISTRICT OF VERMONT'S PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES.

II. WHETHER THE DISTRICT COURT CORRECTLY DENIED THE GOVERNMENT'S REQUEST TO EXCLUDE THE PERIOD OF TIME DURING WHICH MR. KNIGHT COOPERATED WITH U. S. CUSTOMS AGENTS UNDER RULE 5(h) OF THE SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES OR THE DISTRICT OF VERMONT'S PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES.

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BRIEF FOR SAMUEL DONALD KNIGHT

STATEMENT OF FACTS

Samuel Donald Knight was arrested by U. S. Customs Agents on November 29, 1972, in St. Albans, Vermont. He produced identification as one Michael Procak. He was taken before

U. S. Magistrate John Dooley by Agents Neil Lageman and George Klinefelter on the following morning. At the request of Agent Lageman, Mr. Knight was released on his own recognizance by the U. S. Magistrate.

Mr. Knight had extensive discussions with Agent Lageman during the evening of November 29 and the morning of November 30, concerning Mr. Knight's cooperation with the Government in providing information with respect to drug trafficking between Montreal and New York. Mr. Knight agreed to assist Customs Agents in their investigations of such drug trafficking. However, Agent Lageman made no representations that charges against Mr. Knight would be reduced or dismissed.

Mr. Knight signed the bail release form as M. Procak. That form ordered him to appear before the Magistrate on December 8, 1972, for a preliminary hearing. However, Mr. Knight destroyed the form so that he could cross the border, return to Montreal, and begin to assist Customs Agents in their investigations. Mr. Knight did not appear on December 8, although his failure to appear was immaterial since he had been indicted on December 7, 1972.

Two notices were sent by the U. S. District Court on January 23, 1973, ording Knight to appear on January 29, 1973. One notice was sent to "Michael Procak, 7830 Mountain

Sights, Montreal, Quebec, Canada", the name and address given by Knight on the bail release form. Testimony in the subsequent bail jumping case indicates that that address and telephone number were accurate. The other notice was sent to "Michael Procak, 125 Mt. Hope Place, Bronx, New York". Both notices were returned without having been opened, and Mr. Knight failed to appear on January 29. Although informed by Agent Lageman that Mr. Knight would be working with him in his investigation of drug trafficking, the U. S. Attorney's office failed to contact Agent Lageman or take any other steps in attempting to locate Knight. A bench warrant was issued on February 8, 1973.

Mr. Knight had frequent telephone conversations and personal meetings with Agent Lageman between November 30, 1972, and February 4, 1973. In fact, Agent Lageman testified that he met with Knight in Montreal on February 4, 1973, six days after Mr. Knight failed to appear before the U. S. District Court in Burlington, Vermont. During those meetings, Agent Lageman testified that Mr. Knight on at least three occasions asked him how his case was progressing. Agent Lageman continued to state that he could not guarantee that Knight's cooperation would result in reduction or dismissal of charges pending against him.

On February 4, 1973, Agent Lageman referred Mr. Knight

to Customs Special Agent Sidney Bowers, Senior United States Custom Representative in Montreal. Agent Bowers met with Knight on five occasions between February 4 and February 13. During those meetings, Mr. Knight supplied Agent Bowers and agents of the Royal Canadian Mounted Police with information leading to the search of a bus station locker. On February 12, Mr. Knight requested Agent Bowers' permission to move to Toronto to continue his investigations. Agent Bowers made arrangements for Knight to contact R.C.M.P. Staff Sergeant Leonard Rozmus.

Knight contacted Sergeant Rozmus soon after his arrival at Toronto and met with him at the R.C.M.P. office around March 1, 1973. During their meeting, Knight gave Rozmus a substance which appeared to be cocaine and identified the sources of the substance by their nicknames. Sgt. Rozmus asked him to get further information concerning these individuals. Sgt. Rozmus did not recall whether he was given Knight's address and telephone number. There were no further contacts between Knight and Rozmus.

Knight was apprehended as he entered Florida under the name Donald C. Parker on October 17, 1974. He was returned to Vermont on December 7, 1974. On December 16, 1974, Mr. Knight was arraigned before the U. S. District Court, entered pleas of not guilty, and was remanded in lieu of

\$25,000 bail. The Government filed its Notice of Readiness on January 28, 1975, two years, one month and thirty days after Mr. Knight's arrest.

Mr. Knight moved for dismissal of the indictments on a number of grounds, one being a violation of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases and the District of Vermont Plan for Achieving Prompt Disposition of Criminal Cases, effective April 1, 1973*. At the Motion to Dismiss hearing, Agent Lageman testified incorrectly that his last contact with Knight occurred in early to mid-January, and the Court accepted the Assistant U. S. Attorney's statement that Agent Bowers had only minimal contact with Knight. The Court denied Knight's motion, finding Knight to be a fugitive under Rule 5(d), subject to possible amendment or revision upon hearing Agent Bowers' testimony at trial. See Opinion and Order of February 11, 1975, Footnote 4.

* The Second Circuit Rules were in effect when Mr. Knight was arrested. Those Rules were replaced by the District of Vermont's Rules on April 1, 1973. For purposes of this case, the two sets of Rules are virtually identical except for the District's provision to permit the Government to proceed to trial within 10 days if violation of the six month period was done by excusable circumstances.

On May 13, 1975, Mr. Knight was tried on a bail jumping charge in Docket No. 74-101, the jury returning a not guilty verdict on May 15, 1975. During that trial, Agent Lageman testified that his last contact with Knight occurred on February 4. With the testimony of Agent Bowers and Sgt. Rozmus of the C.R.M.P., contact with Knight was established as late of March 1, 1973. Mr. Knight filed a Motion to Revise and Amend on May 27, 1975. The Court granted that motion on June 16, 1975, filing an Opinion and Order on June 19, 1975. The Government filed a Motion for Reconsideration and Rehearing on July 16, 1975, which was denied by the Court on August 4, 1975.

ARGUMENT

Caselaw interpreting the Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases uniformly discusses similar basic principles. First, the six-month requirement is a firm one to which violation results in dismissal of charges U. S. v. MacDonough, 504 F.2d 67 (2d Cir., 1974).

Second, District Courts may exercise discretion in ruling upon the applicability of provisions extending the period beyond six months:

The district court retains the power to determine in its discretion whether the period within which the government must be ready should be extended beyond six months for any one or more of the reasons specified in Rule 5...Hilbert v. Dooling, 476 F.2d 355, 361 (2d Cir. 1973).

Finally, the burden of proof to establish the applicability of the Rule 5 exceptions rests solely upon the Government:

....[T]he burden of proof is on the Government to establish those times to be excluded from the six month period, and failure so to prove in the first instance should be determinative...United States v. Flores, 501 F.2d 1356, 1360 (2d Cir., 1974).

Mr. Knight was arrested on November 29, 1972, and the Government filed Notice of Readiness on January 28, 1975. The Government concedes that more than 6 months elapsed between arrest and its readiness for trial, but asserts that the period March 1, 1973, through December 7, 1974,

should be tolled. Specifically, the Government relies upon two arguments: (1) that between March 1, 1973, and December 7, 1974, Mr. Knight was a fugitive in that he was absent and unavailable under Rule 5(d); and (2) that Mr. Knight was cooperating with the Government, thereby tolling the running of the period under United States v. Valot, 481 F.2d 22 (2d Cir., 1973) and Rule 5(h).

POINT I: THE GOVERNMENT HAS FAILED TO SHOW THAT MR. KNIGHT WAS ABSENT OR UNAVAILABLE BETWEEN MARCH 1, 1973, AND DECEMBER 7, 1974, THEREBY REQUIRING THAT THAT PERIOD BE COMPUTED UNDER RULE 4.

Rule 5(d) of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases permits the tolling of the six-month period for any portion of time when the accused is absent or unavailable. Absence requires a showing that his location is unknown and that either he is attempting to avoid apprehension or his location cannot be determined by due diligence. A defendant is unavailable when his address is known but presence at trial cannot be obtained by due diligence.

As to the absence criterion, Mr. Knight was in contact

with Government agents or Sgt. Rozmus up to March 1, 1973.

In its Brief, the Government asserts that "there is no evidence or suggestion that Knight was contacted or capable of being contacted by United States or Canadian law enforcement officials after he moved to Toronto...." That assertion is false. On page 69 of the transcript involving the testimony of Sgt. Rozmus, there were these statements:

Q. [by Mr. Sessions] Did Agent Bowers give you an address [for Mr. Knight]?

A. [Sgt. Rozmus] I don't know if he gave me an address at that time or not.

Further, on page 72:

Q. [Mr. Sessions] Do you recall if [Mr. Knight] gave you a telephone number or an address when he was here with you?

A. [Sgt. Rozmus] No, I can't remember that.

Under U. S. v. Flores, supra, the Government has the burden of proving that the defendant's address was unknown. The testimony of Sgt. Rozmus indicates uncertainty as to whether or not he possessed Mr. Knight's address and/or telephone

number.

The Government has also failed to show that the second aspect of absence was satisfied. The jury's not guilty verdict in Mr. Knight's bail jumping trial indicates that he was not attempting to avoid apprehension. Further, there has been no showing that Mr. Knight's location could not have been found by due diligence. The Government's only effort at reaching Mr. Knight was in seeking a bench warrant despite the fact that the U. S. Attorney's office knew that Knight was working with Customs agents. One telephone call to Agents Lageman or Bowers or Sgt. Rozmus may have resulted in locating Mr. Knight. This is especially true if Sgt. Rozmus had Mr. Knight's address. Needless to say, however, it is the Government's burden to show that he could not have been reached through diligent efforts, and as to that burden, the Government has failed.

The unavailability section of Rule 5(d) applies only when the Government knows the location of the defendant. The Government asserts that it did not know Mr. Knight's address, although their assertion is unsupported by the evidence. However, even if Mr. Knight's address was known, the Government has offered no evidence to indicate that his presence could not be obtained at trial.

POINT II: THE GOVERNMENT HAS FAILED TO SHOW THAT MR. KNIGHT WAS COOPERATING WITH THE GOVERNMENT IN RETURN FOR REDUCTION OR DISMISSAL OR CHARGES, THEREBY PRECLUDING THE APPLICABILITY OF RULE 5(h) AND U.S. v. VALOT, SUPRA.

At the outset, it is unclear what time the Government wishes to have tolled under Rule 5(h). Under U. S. v. Valot, supra, and U. S. v. Singleton, 460 F.2d 1148 (2d Cir., 1972), where a defendant has entered into an agreement with the Government whereby he would cooperate in their investigations in return for reduction or dismissal of possible charges and where no charges are formally brought while the cooperation lasted, the period of time during such cooperation is to be tolled under the "exceptional circumstances" provision of Rule 5(h). In both the Valot and Singleton cases, the period of time that was tolled was the time that the defendant cooperated with the Government. According to the Government, Mr. Knight stopped cooperating on March 1, 1973. Applying that principle to the present case, I would assume that the Government is asking that the period in which Mr. Knight cooperated be tolled, that is, November 29, 1972, through March 1, 1973. Even if the Government were to show that U. S. v. Valot, supra, excluded that period, its effect is de minimus, since the remaining time between March 1, 1973,

and January 28, 1975, is well in excess of six months.

The Valot case involved a defendant who was cooperating with Government agents, and in that respect is similar to the present case. But Valot also included a number of other key factors that are not present in this case. First, the defendant in the Valot case entered into an agreement with Government officials whereby charges that could be brought against him would be reduced or dismissed in return for his cooperation. Further, the Government did not seek an indictment or proceed with its case against Valot until it had learned of Valot's continuing criminal activity more than five months after his arrest. The Government's failure to proceed while cooperation continued is a central factor in the Valot decision. The thrust of the decision was to prevent individuals from benefiting by illusory agreements that would delay prosecution for six months until the Rules applied.

In the present case, there was no agreement involving a delay in prosecution of the Government's case. In fact, the Government's case was brought forward as if there were no cooperation. The central purpose for applying the exceptional circumstances exception in the Valot case, that is, to prevent individuals from benefiting from agreements that would intentionally delay prosecution for six months until the Rules applied, is not present in Mr. Knight's case.

Without that ingredient, the exceptional circumstances exception under Rule 5(h) should not apply.

CONCLUSION

The Government has failed to meet its burden in proving the applicability of the Rule 5 exceptions in this case. Based upon that fact, as well as the fact that more than 2 years elapsed between the date of arrest and the Government's filing of its Notice of Readiness, the District Court in its discretion dismissed charges pending against Mr. Knight in CR. NO. 6870 and CR. NO. 74-100. The District Court Order should be affirmed for the reasons stated herein.

RESPECTFULLY SUBMITTED,



William K. Sessions III
Attorney for Defendant

September 10, 1975

CERTIFICATE OF SERVICE

I, William K. Sessions III, Esq., Attorney for the Appellee, hereby certify that on the 10th day of September, 1975, I served the foregoing BRIEF FOR SAMUEL DONALD KNIGHT, by first class mail, postage prepaid to William Gray, Esq., Assistant United States Attorney, United States Attorney's Office, Rutland, Vermont, a conformed copy thereof.

by William K. Sessions III
William K. Sessions III